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any person or persons anywhere within the corporate limits. The contract bore date May 11th 1867, and though it is said the plaintiff does not complain of this amendatory section of the ordinance, it is clear that he had the same right to complain of it, so far as it affected the stipulation of the contract, that he had to complain of any other act in disregard of those stipulations.

Our conclusion is that the village has incurred no liability to the plaintiff by the acts and omissions complained of, and that the judgment of the court below should be affirmed.

The other justices concurred.

United States Circuit Court, Southern District of New York.

WILLIAM A. BRITTON v. BENJAMIN F. BUTLER.

Although commercial intercourse between the states in insurrection and those in occupation of the United States during the late war was unlawful, and therefore a bill of exchange drawn in Mississippi on a person in New Orleans while the latter was under control of the Federal army was void, yet a capture of such bill by the United States commander did not authorize him to collect and confiscate the money in the hands of the drawee in New Orleans.

Whether money voluntarily paid by the drawee under such circumstances can be recovered back, not decided.

An action of *assumpsit* to recover money so seized, not within the statute of March 3d 1863, limiting actions for arrests or imprisonments under color of authority of the United States to two years.

Vose & McDaniel, plaintiff's attorneys. *E. P. Wheeler*, of counsel.

Develin, Miller & Trull, defendant's attorneys. *John E. Develin*, of counsel.

BLATCHFORD, J.—This suit was brought in a state court and transferred into this court. The declaration is in *assumpsit*, on the money counts and an account stated. The damages are laid at \$15,000, and the causes of action are alleged to have occurred at New Orleans, in the state of Louisiana, on the 1st day of September 1862. The defendant pleads the general issue and two special pleas. To each of the special pleas a special demurrer is interposed by the plaintiff, alleging defects in substance and form.

The first special plea avers that, from the 24th of February 1862, until the 16th of December 1862, the defendant was a major-general of volunteers, duly commissioned by the President, in the service of the United States, and was assigned to the military geographical department of the Gulf, including within its bounds the state of Louisiana, and, as such commander so assigned, took possession of the city of New Orleans and the adjacent portion of said state of Louisiana, and held the same by the armed forces of the United States, of which he was in command in time of war, and, with such armed forces, was engaged in carrying on the war and suppressing the recent rebellion against the United States, then having broken out into public territorial war in said state of Louisiana and the adjacent states of Mississippi and Texas; that by due proclamation, according to the customs and usages of war, martial law was declared and proclaimed and obtained in said department from the 1st of May in said year 1862, all the time till the 16th day of December in said year, and during all said time the defendant was acting under the orders and proclamations of the President of the United States, and in administration, and in virtue and under color of the Acts of Congress; that, on the 16th of August 1861, pursuant to the statutes of the United States in such case made and provided, the inhabitants of the states of Louisiana and Mississippi and other states, were, by a proclamation of the President of the United States, declared to be in a state of insurrection against the United States, and that all commercial intercourse should cease, as by such proclamation will fully appear; that, at the time of the promises and undertakings, and of the supposed grievances complained of by the plaintiff, and subsequently thereto, such proclamation was and remained in full force and virtue; that, on or about the 1st of September, in said year, the pickets of the armed forces of the United States then under the command of the defendant, and stationed on the outer lines of the camp or garrison of New Orleans, for the protection of said camp or garrison against the enemy, captured a person endeavoring to make his way furtively from the lines and territory occupied by the enemy, to wit, from the city of Natchez, in said state of Mississippi, then in the armed occupation of the enemy, to the said city of New Orleans, then in the armed occupation and possession of the United States forces aforesaid; that there were found concealed upon the per-

son so captured two or more drafts, checks, or bills of exchange, drawn by persons or firms doing business in said city of Natchez, then in the occupation of the enemy, upon persons or firms doing business in the said city of New Orleans, then in the occupation of the United States forces; that thereupon the defendant, as such major-general, and in obedience to the orders and proclamations of the President of the United States, and in the administration and in virtue and under color of the Acts of Congress in such case made and provided, captured said drafts, checks or bills of exchange, and caused the proceeds thereof, when collected, to be turned over to the treasury of the United States, which said proceeds have been duly passed upon, audited, and credited to him by the order of the President of the United States; and that out of the acts and doings aforesaid, and not otherwise, arose the said several causes of action of which the plaintiff complains.

Under the provisions of the 5th section of the Act of July 13th 1861, 12 U. S. Stat. at Large 257, and the proclamation of the President of August 16th 1861, Id. 1262, the inhabitants of the states of Mississippi and Louisiana (with certain specified exceptions) were declared to be in a state of insurrection against the United States, and all commercial intercourse between the said states of Mississippi and Louisiana and the inhabitants thereof, and the citizens of other states and other parts of the United States, was made unlawful after the date of said proclamation, with the said specified exceptions. One of those exceptions excepted from the inhabitants of the state of Louisiana the inhabitants of such parts of that state as might be from time to time occupied and controlled by forces of the United States engaged in dispersing the insurgents against the laws, Constitution, and government of the United States. On the facts set up in the first special plea it clearly appears that on the 1st of September 1862, and when the matters alleged in the said plea took place, commercial intercourse between the state of Mississippi and the city of New Orleans was unlawful. That being so, the drafts, checks, or bills of exchange mentioned in that plea, drawn by persons doing business in Natchez, Mississippi, on persons doing business in New Orleans, were illegal and void instruments: *The Ouachita Cotton*, 6 Wall. 521, 530; *Woods v. Wilder*, 43 New York 164.

The defendant contends that, as the bills of exchange were thus void, they were subjects of confiscation ; that as martial law prevailed, and there were no courts and no civil authorities, the bills of exchange became confiscate at the will of the commanding general, without any of the ordinary processes of law ; that the bills thus became the property of the United States, in the hands of the general in command ; and that he, on behalf of the United States, and as its agent, collected the amounts for which they were drawn, being the same moneys to recover which this suit is brought, and that that is a defence to the suit. It is difficult to see how the consequence logically follows the premises. If the bills of exchange were void, then, even if they were confiscable by mere seizure, it is difficult to see how their seizure and confiscation passed a title to the United States to the moneys in the hands of the drawees of the bills in New Orleans, which the defendant sets up that he afterwards received as a collection of the bills. The bills are not averred to have been accepted by the drawees before they were seized. The confiscation, by the seizure, if of anything, was merely of the naked pieces of paper seized. It gave no valid claim to the United States to collect from the drawees the moneys expressed in the bills. If the moneys were seized in the possession of the drawees, the transaction was no different from what it would have been if the bills of exchange had never been drawn or seized. If the moneys were voluntarily paid by the drawees to the defendant, on a demand for them, as being drawn for by the bills, the bills being void instruments, their seizure could confer on the United States and on the defendant no title to receive or retain the moneys, which they would not have had if the bills had never been seized or presented. The transaction set up in the first special plea comes down, then, to this, that the defendant, by order of the President of the United States, either took or received the moneys referred to, which are the moneys sued for.

If the defendant took the moneys by seizing them, the act, so far as the special plea shows, was unlawful. The moneys are not therein alleged to have been forfeitable or subject to seizure for any cause whatever. No Act of Congress, or proclamation or order of the President is referred to, which made such moneys forfeitable or liable to seizure. They were not seized while passing between loyal and disloyal territory. They were in loyal

territory. The plea is, that the defendant, having captured these void drafts in the discharge of his duty, took away from the persons who were the drawees of the drafts, certain moneys belonging to the plaintiff, and paid them into the treasury of the United States, and that, by the order of the President of the United States, those moneys have been passed upon, audited, and credited to him. There is no warrant for saying that the transaction, as set up in the plea, if one of seizure, was lawful. The moneys are not even averred to have been the property of an enemy or of an insurgent. The fact that the drawers of the bills, which are alleged in the plea to have been drafts, checks, or bills of exchange, were within the insurgent territory, and that the bills were drawn there, although it may warrant the presumption that the drawees were debtors to the drawers to the amount of the bills, does not warrant the presumption that the moneys in the hands of the drawees were not the moneys of the drawees, or were the moneys of persons within the insurgent territory, or were the moneys of the enemy. The case, then, as one of seizure, is one of the seizure, in loyal territory, of the moneys of persons in such territory, not alleged to have been enemies of the United States.

Even if the moneys were the property of an enemy of the United States, or were the representative of debts due to such enemy, the plea sets up no authority for their seizure. The mere declaration of war does not confiscate enemy property, or debts due to an enemy, nor does it so vest the property or the debts in the government, as to support judicial proceedings for the confiscation of the property or debts, without the expression of the will of government, through its proper department, to that effect. Under the Constitution of the United States, the power of confiscating enemy property and debts due to an enemy is in Congress alone: *Brown v. United States*, 8 Cranch 110. In legislating on the subject, Congress has passed various acts, but none of them authorize the confiscation of moneys situated as the moneys in this case are alleged by the plea to have been situated. The Act of August 6th 1861, 12 U. S. Stat. at Large 319, provides for the seizure by the President, and the condemnation by judicial proceedings, of property acquired or disposed of with intent to employ the same in aiding the insurrection, and property knowingly so employed. The Act of July 17th 1862, Id. 589, provides for

the seizure by the President, and the application to the support of the army of the United States, through judicial proceedings, of the proceeds of the property, money, credits, and effects of persons holding office under the insurgents, and of persons owning property in loyal territory, who aid the rebellion, and of persons in the rebel states, in arms or aiding the rebellion, who do not return to their allegiance within sixty days after warning by proclamation. The Act of March 12th 1863, Id. 820, provides for the confiscation, through judicial proceedings, of property coming from within the insurgent states into the loyal states, otherwise than according to regulations prescribed by that act. All of these acts provide for a seizure only with a view to judicial proceedings. Even if a seizure in this case was lawful, no judicial proceedings are set up, but only a turning over of the moneys to the treasury of the United States.

Considered as a capture of documents constituting the evidence of debts due to an enemy (if that is predicable of unaccepted bills), and as giving the right to capture the moneys, representing the debts, as the property of the enemy, the transaction stands in no different posture. The bills captured were not the debts. The possession of the unaccepted bills gave no right to the captors to take physical possession of the moneys of the drawees, and could have no effect to divest or affect the title of the drawees to such moneys, or their right of possession in the same: Halleck on International Law, c. 19, § 8.

The Act of March 2d 1867, 14 U. S. Stat. at Large 432, is invoked in aid of the plea. That act provides that all acts and orders of the President, or acts done by his authority or approval, after March 4th 1861, and before July 1st 1866, "respecting martial law, military trials by courts martial or military commissions, or the arrest, imprisonment, and trial of persons charged with participation in the late rebellion against the United States, or as aiders or abettors thereof, or as guilty of any disloyal practice in aid thereof, or of any violation of the laws or usages of war, or of affording aid and comfort to rebels against the authority of the United States, and all proceedings and acts done or had by courts martial or military commissions, or arrests and imprisonments made in the premises, by any person, by the authority of the orders or proclamations of the President, made as aforesaid or in aid thereof," are thereby approved in all

respects, legalized and made valid, "to the same extent and with the same effect as if said orders and proclamations had been issued and made, and said arrests, imprisonments, proceedings and acts had been done under the previous express authority and direction of the Congress of the United States, and in pursuance of a law thereof previously enacted, and expressly authorizing and directing the same to be done." It also provides, that no court shall have or take jurisdiction of, or in any manner reverse any of the proceedings had or acts done as aforesaid, nor shall any person be held to answer in any of said courts for any act done or omitted to be done, in pursuance or in aid of any of said proclamations or orders, or by authority or with the approval of the President within the period aforesaid, and respecting any of the matters aforesaid;" and that "all officers and other persons, in the service of the United States, or who acted in aid thereof, acting in the premises, shall be held, *prima facie*, to have been authorized by the President." This act applies solely to "the matters" and "the premises" mentioned in it, and those do not embrace the transaction set up in the plea. The fact that martial law obtained in New Orleans on the 1st of September 1862, does not, on the allegations in the plea, make an order of the President authorizing or approving the seizure of these moneys, an act or order of his respecting martial law, or make the act of the defendant in seizing the moneys an act of his respecting martial law within the meaning of the statute. There is nothing in the mere existence of martial law which, on the facts alleged in the plea, justifies the seizure of the moneys. In the case of *The Venice*, 2 Wall. 258, the Supreme Court, referring to the reoccupation of New Orleans by the forces of the United States in May 1862, and to the proclamation of the commanding general on the 6th of that month, declaring the city to be under martial law, and also declaring that "all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States," says that, under the Act of July 13th 1861, and the proclamation of the President of August 16th 1861, the city of New Orleans, after its actual, substantial, complete, and permanent military occupation and control by the United States, in May 1862, could not be regarded as in actual insurrection, nor could its inhabitants be regarded as subject, in most respects, to treatment as enemies, and that such military occupation and con-

trol drew after it the full measure of protection to persons and property consistent with a necessary subjection to military government. The plea sets up no necessity for the seizure of the moneys, and no justification therefor, within these principles.

If the moneys were voluntarily paid to the defendant, and not seized by him by military power, the fact that he received them as major-general, and in obedience to the orders of the President, and paid them into the treasury, and that such payment has been approved by the President, cannot vary his liability for them to the plaintiff, if he would be liable for them in case no such fact existed, on evidence to be adduced by the plaintiff under his declaration. Whether, if the case ever comes to trial on the plea of the general issue, the plaintiff can make out the defendant's liability, is another question. All I mean to say is, that if the defendant is otherwise liable, the facts set up in the plea constitute no defence to the action.

The demurrer to the first special plea must, therefore, be allowed, with leave to the defendant to amend, on payment of costs.

The second special plea avers, that the pretended acts which, if true, would give to the plaintiff the supposed causes of action mentioned in the declaration, were performed, if performed by the defendant, as a major-general of volunteers in the army of the United States, duly commissioned by the President, and under and in pursuance of the laws of the United States, and the orders and proclamations of the President, and during the late rebellion of the Southern States against the authority of the General Government of the United States; and that said supposed causes of action did not, nor did any or either of them, accrue within two years next before the commencement of this action, nor within two years after March 3d 1863.

The statute relied on as supporting this plea is the 7th section of the Act of March 3d 1863, 12 U. S. Stat. at Large 757, which enacts that no suit or prosecution, civil or criminal, shall be maintained for any arrest or imprisonment made or other trespasses or wrongs done or committed, or act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or by or under any Act of Congress, unless the same shall have been commenced within two years next

after such arrest, imprisonment, trespass, or wrong may have been done or committed, or act may have been omitted to be done, provided that in no case shall the limitation herein provided commence to run until the passage of this act, so that no party shall, by virtue of this act, be debarred of his remedy by suit or prosecution until two years from and after the passage of this act." It is sufficient to say that this suit is an action of *assumpsit*, and is not a suit for an arrest or imprisonment made, or a trespass or a wrong done or committed, or an act omitted to be done, during the rebellion. Moreover, the plea does not aver that the "pretended acts" which it refers to, were arrests, or imprisonments, or trespasses, or wrongs. The 4th section of the same act makes an order of the President, or under his authority, made during the existence of the rebellion, a defence only to an action or prosecution, civil or criminal, "for any search, seizure, arrest, or imprisonment made, done or committed, or acts omitted to be done under and by virtue of such order, or under color of any law of Congress." The nature of the action, for the purposes of the demurrer to this plea, can be judged of only by the declaration.

The demurrer to the second special plea is, therefore, allowed, with leave to the defendant to amend on payment of costs.

Supreme Court of Mississippi.

WASHINGTON FORD v. JAMES SURGET.

During the late war cotton was treated by both belligerents as *quasi* contraband of war and liable to seizure or destruction.

Acts done by the military authorities of the Confederate States within the legitimate sphere of war, do not render the doers liable to private parties whose property may have been injured thereby.

Defendant, under the order of a Confederate provost-marshal, burned plaintiff's cotton, both parties being at the time within the lines of a Confederate military district and subject to the Confederate authority. *Held*, that defendant was not liable for the loss to plaintiff.

SIMRALL, J.—The pleas in bar set up in substance, that the people and state of Mississippi in combination and confederation with Louisiana, Alabama, Georgia, and other states known as the Confederate States, were waging war against the United States.